United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/ affidavit of mailing

75-1338

To be argued by
RICHARD APPLEBY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1338

B/P/S

UNITED STATES OF AMERICA,
Appellee,

—against—

ALVIN BURGESS,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Preliminary Statement

Alvin Burgess appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Judd, *J.*) entered on September 19, 1975, following a jury trial, of violating Title 18, United States Code, Section 659, as charged in the one count indictment, in that he did unlawfully take from a motor truck, oil burners and oil burner parts worth approximately $8,000 that was part of an interstate shipment of freight. Appellant Burgess was sentenced to three years imprisonment. He is currently on bail pending the outcome of this appeal.

The sole issue appellant raises in this appeal is whether the district court improperly received evidence of his prior New York State misdemeanor conviction in 1972 for criminal possession of stolen property, a stolen motor vehicle, under the prior similar acts doctrine and Rule

404(b), Federal Rules of Evidence. Appellant argues that the only purpose the Government sought to introduce such evidence was to impugn his character.

Statement of the Case

A. The Government's Case

On November 18, 1974 the defendant Alvin Burgess, a truck driver, was employed by the J.W. Martin Trucking Company, an independent trucking company. Early that morning his employer, James W. Martin, instructed Burgess to pick up a mixed load of merchandise at the Ohio Fast Freight Company in Port Elizabeth, New Jersey for delivery to different consignees in Queens and Long Island (121).

John Tully, the dispatcher at Ohio Fast Freight, testified that Burgess arrived at Port Elizabeth early in the morning of November 18. After Burgess had backed his truck into the platform, the several different items of merchandise which he had been instructed to pick up were loaded on his truck. Present also on the loading dock was a shipment of oil burners and oil burner parts on a trailer which had arrived earlier that morning from Elyria, Ohio and which were destined for the Winkler Corporation in Patchogue, Long Island. Burgess requested Mr. Tully to arrange to have this additional merchandise placed on the "tail" (i.e. back) of his truck, stating: "Give me that shipment, I will take it, I can get rid of it today" (44).[1]

[1] Contrary to appellant's assertion (Br. p. 2), Burgess was paid by his employer weekly and not by the amount of merchandise on his truck that day (16). In view of the fact that merchandise loaded onto the tail of the truck is generally delivered first (16-17); that the oil burners weighed approximately 4,000 pounds (18-19); and that Burgess had many deliveries to make in Queens prior to the Winkler Corporation delivery, the jury may well have concluded that Burgess had formed his intent to steal the oil burners at Ohio Fast Freight.

Tully agreed and the oil burners were loaded on the tail of Burgess' truck with the use of hi-lo machinery. The oil burners, weighing approximately 4,000 pounds, were on five separate skids and secured to the skids by steel bands (18-19). While Burgess was at Ohio Fast Freight (whether it was before or after the merchandise was loaded was unclear), he called his employer, James W. Martin, to tell him that he had picked up the mixed load as well as the oil burners (123). Prior to his departure from Ohio Fast Freight, Burgess signed a loading copy for the oil burners, acknowledging that he had picked up the merchandise (19-22; Government's Exhibit 1). Burgess signed loading copies for the other merchandise that had been loaded onto his truck (Government's Exhibits 6A-6U and 6V through 6EE). He then left to begin his deliveries.

Needless to say, a representative of the Winkler Corporation testified that the shipment of oil burners never reached its destination (63).

Burgess arrived at the J. W. Martin Trucking Company later that evening. Since Burgess did not present the delivery copy for the oil burners, Mr. Martin asked Burgess about this delivery. Burgess stated to Mr. Martin and another employee of the company, James Jackson, that the shipment of oil burners had not been loaded that day at Ohio Fast Freight (125, 169).

The next day, November 19, Burgess telephoned Martin and told him that he was sick, that he was going to a doctor, and that he would not be able to work the next day (126). On November 20, 1975, Martin, as was his custom, went to Burgess' residence to pick him up for work (127-128). There Martin learned that Burgess had moved from his residence and had left no forwarding address (128). Martin and Jackson made numerous inquiries concerning Burgess' whereabouts but were unable to locate him.

At the conclusion of the Government's case, a stipulation was read to the jury "that defendant Alvin Burgess was convicted on February 25, 1972 on a plea of guilty of criminal possession of a stolen motor vehicle in violation of New York Penal Law, Section 165.40, as a Class A misdemeanor" (192).

B. The Defense Case

The jury had been alerted to the defense in this case at the outset because in her opening statement defense counsel stated that it was the defendant's position that he had not stolen the oil burners but instead had been hijacked (9-11). In referring to Burgess' position in the case, she stated (in the first person): "I [Burgess] may have had them [the oil burners] on my truck, but they were stolen from me. I was hijacked" (9-10). What the jury was not alerted to, however, was the fantastic nature of the "hijacking".[2]

Burgess provided the details of alleged "hijacking" both on direct and cross examination. Burgess admitted that he had picked up the oil burners on November 18, 1975 at Ohio Fast Freight (210). Burgess denied that

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[2] As is common in criminal cases, the defense strategy emerged on the cross-examination of the Government's witnesses when at the very beginning of the cross-examination of James Martin, Burgess' employer, defense counsel elicited that Burgess had previously worked for another trucking company, Pagano Brothers, that his work record had been satisfactory and that on the basis of that recommendation Burgess was hired by Martin (135). Thus, when defense counsel objected to the Government's introduction of Burgess' 1972 conviction as a prior similar act, Judge Judd stated: "Well, I thought after you tried this morning to bring out the good record that Mr. Burgess got from his preceding employee (sic) that you were waiving any objection to this" (184). Interestingly, defense counsel made no reply to the judge's comment. Moreover, it should be emphasized that before Judge Judd ruled that the prior similar act was admissible, defense counsel had made it clear to the judge that Burgess was going to take the stand (187).

the oil burners had been loaded on the tail of the truck, stating that they had been placed in the "center right" (212). After leaving Ohio Fast Freight, Burgess testified that he made several deliveries in Queens and began to drive his truck to a delivery stop in Rockville Centre. Burgess' intention was to go to Patchogue to deliver the oil burners after the stop in Rockville Centre. On his way to Rockville Centre, Burgess stopped for a red light at the intersection of Farmers Boulevard and Merrick Road.

There at the intersection, at approximately 4:30 P.M., Burgess turned to his right and saw a gun pointed through the window (217). Rush hour was in progress (256, 258). A black man wearing a ski mask jumped in the tractor of the truck and directed Burgess to drive straight on Farmers Boulevard (217). According to Burgess, the masked gunman thereafter instructed him to pull over to the curb on Farmers Boulevard, approximately a block away from North Conduit Avenue.[3]

The gunman told Burgess to stare straight ahead. Burgess complied for twenty minutes (218). At one point Burgess testified, he tried to look into his sideview mirror on the left side of the truck but was unable to do so because he has a bad left eye (220).

Burgess then heard the doors to his truck opening. For the next thirty-five minutes, while a gun was trained at his head, he heard freight moving inside his truck (221). Burgess stated that he heard no machinery or

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[3] Through Burgess, photographs of the intersection of Farmers Boulevard and Merrick Road were introduced (Government's Exhibit 8, 259, 286). The photographs demonstrate, and Burgess admitted, that the intersection is a busy one (256), that buses operate through the intersection (263), and that there are two gas stations (263). Burgess admitted that Farmers Boulevard is at least four lanes and is a busy thoroughfare its entire length (266).

hi-los during the course of the hijacking but explained this anomaly by stating that a strong man was capable of lifting a skid of oil burners weighing 700 pounds (269). During the course of the hijacking, a second hijacker asked the gunman for the delivery bills. Burgess heard the second hijacker's voice but did not see him (222). The gunman gave the second hijacker the delivery copy for the oil burners, but the hijackers did not bother to take the remaining delivery copies for the other merchandise on Burgess' truck.

After a total of fifty-five minutes had elapsed (218), Burgess was instructed by the gunman to drive to Aqueduct Raceway, at which point the gunman jumped out of the tractor and stated as Burgess recalled: "Man, don't tell the police about this because we know as much about you and your family that we know about this shipment right here."

After the gunman left, Burgess checked his freight and discovered that the oil burners had been stolen (222). Curiously, the hijackers had not taken any of the other merchandise remaining on his truck (222). After the hijacking, Burgess did not observe any steel straps which had secured the oil burners (270).

Burgess denied that he had ever told Martin or Jackson that he was unable to pick up the oil burners. Burgess testified that he did not inform Martin of the hijacking because he would have started an argument (227). He did not inform anyone else of the hijacking because he was afraid (227).[4] Burgess turned himself in because,

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[4] Despite the fact that he was able to recall specific times for each of his deliveries (249, 250, 251), Burgess testified that he was not wearing his watch that day because it was broken. After he departed from the J.W. Martin Company on November 18, 1975, and just after the alleged hijacking, Burgess bought himself a new watch and a new pair of shoes (235). However, the evening of November 18, when Burgess said he was ill from nervousness and fright (247), he testified that he did not see a medical doctor because he did not have enough money (247).

after a warrant had been issued for his arrest, his employer at the B & C Bus Company had been subpoenaed to testify in the Grand Jury concerning Burgess' whereabouts and had thereafter directed Burgess to telephone the United States Attorney's Office.

Miss Louise Scurry also testified in behalf of Burgess. She stated that she was his godmother and sometime near the end of November Burgess began to live with her.

In rebuttal, Allan Garber, an agent from the Federal Bureau of Investigation, testified that he took a statement from Burgess after Burgess arrived at the United States Attorney's Office. Garber testified to several statements made by Burgess which were inconsistent with his testimony at trial (285).[5] Garber also testified to the many efforts he made in trying to locate Burgess after a warrant had been issued for his arrest (287).

POINT I

EVIDENCE OF BURGESS' UNLAWFUL POSSESSION OF THE STOLEN MOTOR VEHICLE WAS ADMISSIBLE UNDER THE PRIOR SIMILAR ACTS DOCTRINE AND RULE 404, FEDERAL RULES OF EVIDENCE.

Burgess argues that it was an abuse of discretion for Judge Judd to permit the introduction of his 1972 misdemeanor conviction for criminal possession of a stolen automobile because the only value such evidence had was

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[5] Compared with the evidence in chief against him, as buttressed by his own incredible testimony, Burgess' prior inconsistent statements were small potatoes. Burgess never mentioned initially that he had a stop in Rockville Centre (284); that the hijackers took only the delivery ticket for the oil burners (285); that there was a second hijacker (285). He also stated at that time that his conviction in 1972 in connection with the automobile theft had been dismissed (286).

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

PBB:RWA:ec

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

December 24, 1975

Honorable A. Daniel Fusaro
Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: United States v. Alvin Burgess
Court of Appeals No. 75-1338

Dear Mr. Fusaro:

In our brief (page 8, footnote 7) we mistakenly have stated that no exception was taken to the district judge's charge that appellant's failure to report the hijacking to law enforcement authorities constituted misprison of a felony. In reviewing the trial record of this case I recently noted the following at page 326 of the trial record:

"Mrs. Seybert: I would also object to that request on the basis of the fact that Mr. Burgess had no knowledge that a felony had been committed. He didn't know..

The Court: 'I heard that but I can't believe it.'"

I would appreciate it if you would provide a copy of this letter to each member of the panel

which heard this case. The date of argument was December 22, 1975. For your convenience, I have enclosed herewith three copies of this letter.

Respectfully yours,

DAVID G. TRAGER
United States Attorney

Richard W. Appleby by PBB.

By: Richard W. Appleby
Assistant U.S. Attorney

Encl.

to impermissibly impugn his character.[6] We submit that, for several reasons, particularly when conjoined, Judge Judd acted well within his discretion in admitting this evidence.[7]

The rule in this Circuit regarding evidence of prior similar crimes is an inclusionary one, that is, that such evidence is admissible "*for all purposes*" except to show the criminal character or disposition of the defendants." *United States* v. *Warren*, 453 F.2d 738 (2d Cir. 1972) (emphasis supplied); *United States* v. *Gerry*, 515 F.2d 130 (2d Cir. 1975); *United States* v. *Brettholz*, 485 F.2d 483 (2d Cir. 1973); *United States* v. *Deaton*, 381 F.2d 114 (2d Cir. 1967); see also, Federal Rules of Evidence, Rule 404(b). One of the clearly permissible reasons for the introduction of this evidence was to show that Burgess committed the theft with the requisite intent. Intent is ordinarily the key issue in § 659 cases, and, in fairness, the Government is entitled to assume that intent will be an issue. Thus, the United States has the right and obligation to prove this element with the most convincing evidence

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[6] Burgess does not claim that the prior similar act was not "similar" or that it was too remote in time.

[7] Burgess also argues that the trial judge erred when he charged the jury that Burgess' failure to report the hijacking to law enforcement authorities constituted misprison of felony. Appellant argues that this charge coupled with the evidence of his prior conviction somehow amounted to a general assault upon his character. Appellant cites no authority to support this proposition. Defense counsel took no exception to this portion of the judge's charge. The judge accurately stated the law. The judge was careful to point out that Burgess was not on trial for that offense but that the jury could consider the failure of Burgess to report the hijacking on the issue of his state of mind and intent (". . . but you can consider whether his failure to report it [the hijacking] was because of fear or ignorance or whether it was because he would have been reporting something of which he was guilty or likely to be suspected of being guilty" (354-355)). We fail to see how any error, let alone plain error, was committed.

available. Here, the Government's evidence was entirely circumstantial. In view of the Government's difficult burden, in general, in these kind of cases on the issue of intent and, in particular, in view of the Government's evidence in this case (which, prior to appellant's testimony was not overwhelming), it is submitted that Judge Judd did not abuse his discretion in admitting the prior similar act. See *United States* v. *Natale*, — F.2d — (2d Cir. Slip op. 793, 812-813; decided November 28, 1975).

It is argued by appellant (Br. 10), however, that intent was not in issue since the only determination the jury had to make was to choose between Burgess' version of the facts and the Government's version. We question whether that choice was necessarily so clear-cut and whether it did not involve an inquiry by the jury into the defendant's state of mind.[8] But, in any event, the Government did not have to limit its proof according to defense counsel's assertions of the defendant's position in her opening statement. Despite the fact that the hijacking defense was forecast by the defense in the opening statement, Burgess had the right to rest after the Government's case and demand a directed verdict of acquittal by the judge or, if that was unsuccessful, a verdict of acquittal by the jury, on the ground that the Government's evidence of intent was sorely lacking.

We also believe, as did Judge Judd (184), that when defense counsel elicited from Burgess' employer, James Martin, that Burgess had been recommended to him from another trucking company, there was a strong implication to the jury that Burgess had an unblemished past, one

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[8] It is not inconceivable that the jury could have rejected Burgess' story about the masked gunman yet still have acquitted because, in reading between the lines of his testimony, it felt that Burgess was somehow coerced into "giving up" the oil burners by individuals known to him and that he was impelled to continue protecting other persons even in his testimony.

free from any encounters with the law. We can fathom no other purpose in this testimony. And, as stated above, when Judge Judd made similar remarks to defense counsel she offered no reply. Therefore, it certainly was within Judge Judd's discretion to allow the Government to correct this misleading impression and thereby show Burgess' prior conviction. See *United States* v. *Harvey*, — F.2d —, (2d Cir., Slip op. 6493, 6507; decided November 20, 1975).

Finally, at the time that prior similar act was introduced, defense counsel, both in her opening statement (9-10), and in response to an inquiry from Judge Judd (187), had made it clear to both the jury and Court that Burgess was going to take the stand in his own behalf.[9] That being so, it made little difference whether the jury was informed of the conviction on the Government's direct case or on cross-examination of Burgess.[10]

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[9] There is no claim, nor could there be in view of defense counsel's opening statement, that the Government forced Burgess to take the stand. It should be noted that as part of the stipulation regarding Burgess' prior conviction the Government agreed not to ask Burgess any questions concerning that conviction.

[10] The misdemeanor crime of criminal possession of stolen property is probative of Burgess' credibility under Rule 609(a)(2) because it involves "dishonesty" and is in the nature of *crimen falsi*. See Wigmore, *Evidence*, Volume II, p. 612 n.3 and p. 613 n. 11. Since Burgess took the stand it was not improper for the prosecutor to indicate to the jury that the prior conviction was probative of Burgess' credibility. See *United States* v. *Reed*, — F.2d — (2d Cir. Slip op. 6483, 6488, decided November 18, 1975). The prosecutor was careful to point out to the jury that the conviction was not being used to show the defendant's bad character (372). No exception was taken to any of the prosecutor's remarks, and surely they did not amount to plain error. Moreover, Judge Judd was also careful in his charge to point out to the jury that this evidence was only relevant on the issue of intent and not to show bad character (387).

The admissibility of a prior similar act, as shown by a prior conviction, is a discretionary decision by the trial judge. Confronted by all these factors—the fact that intent is always in issue, the fact that a misleading impression had been created by defense counsel, and the fact that it was plain that Burgess was going to take the stand in any event—it can hardly be said that Judge Judd abused his discretion.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

Dated: December 10, 1975

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
RICHARD APPLEBY,
Assistant United States Attorneys,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 11th day of December, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Joanna Seybert, Esq.
Legal Aid Society
509 U.S. Courthouse
Foley Square
New York, N.Y. 10007

Evelyn Cohen

Sworn to before me this
11th day of Dec. 1975

Juanita Mayo

JUANITA MAYO
Notary Public, State of New York
No. 24-4501911
Qualified in Kings County